Supreme Court of the United States

OCTOBER TERM 1952

No. 341

WILLIAM POULOS,

Appellant

v.

THE STATE OF NEW HAMPSHIRE

Appellee

APPEAL FROM THE SUPREME COURT
OF THE STATE OF NEW HAMPSHIRE

APPELLANT'S REPLY TO OPPOSITION TO JURISDICTION

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MAY IT PLEASE THE COURT:

The statement made in opposition to jurisdiction by the appellee, if relied upon without scrutiny, will lead this Court to the erroneous conclusion that no federal question was presented by appellant in the state court or is involved

upon this appeal. While the jurisdictional statem
sufficient on these points, to lighten the labor of the
and to help the Court avoid the confusion that the a
is captured by, this reply is made.

I

It is contended that no attack was made on the "r
ableness of the action of the City Council". See pag
the statement by appellee. In order to rely on the
stitutionality of the enforcement of the ordinance
Portsmouth policy to exclude religious meetings fro
park, it was not necessary to add to the charge of a vio
of the Federal Constitution that the enforcement wa
reasonable". The unreasonableness is implied in the c
that appellant's constitutional rights were violated b
City Council. Moreover, the sufficiency of the federal
tion is not dependent upon the word "unreasonable".

II

The statement is made by the appellee that the e
tion to the denial of the motion to dismiss and to
a judgment of acquittal is *limited* to the grounds tha
denial of the permit was *arbitrary and capricious and*
it was the duty of the City Council to issue the pe
This statement is untrue. The motion in the trial court
not thus limited. The motion stated that the denial o
permit was an unconstitutional enforcement of the
nance so as to abridge the rights of appellant, and th
the appellant was convicted by the court under the
nance he would be denied his rights of freedom of assem
speech and worship contrary to the First and Fourte
Amendments to the United States Constitution. Excep
was taken to the denial of this motion. The constituti
question presented in the trial court was also raised
exception in the Supreme Court. The description of

unconstitutional action by the City Council as "arbitrary and capricious" did not limit or nullify the federal question presented that the construction, application and enforcement of the ordinance violated the rights of appellant contrary to the First and Fourteenth Amendments.

III

Much is made by appellee over the failure of the court to discuss the federal question in its opinion, and the failure of the appellant to get a certificate from the Supreme Court of New Hampshire that it determined the federal question. While it is true that a discussion of the federal question in the opinion or the certificate would help the appellant to stop the mouth of appellee on the determination of the question, neither of those elements is a prerequisite to the presence of the federal question. The question was actually and properly raised in the record. The New Hampshire courts evaded the question by ignoring the federal grounds raised in the motion, and by considering the motion and the exception as though the only point raised was the state question of 'arbitrariness and capriciousness'. The ignoring of the point of the motion raising the federal question was patently an evasion of the question. The courts below were not permitted to consider only the state question raised in the motion and to ignore the federal question. It was arbitrary, capricious, and a violation of the Federal Constitution for the courts below to resort to the trick of erasing the federal question from the motion. They should have taken the motion in its entirety, as was done in *State* v. *Cox*, 91 N. H. 137, affirmed *Cox* v. *New Hampshire*, 312 U. S. 569, rather than indulge in legerdemain.

It is, therefore, obvious that the failure to discuss the federal question in the opinion, as the court did in the *Cox* case, was not due to the question's not being raised. But it is apparent that the failure to discuss the question is

a subterfuge to shun and illegally elude the responsibilit
properly placed on the courts by the appellant in this cas

Since it is clear that there has been an illegal evasio
of the properly presented federal question, under the pre
text that only a state question is involved, it is neither nec
essary nor advisable that this Court wait for the appellan
to obtain a certificate from the Supreme Court of New
Hampshire.

If the right to get a determination of a properly raised
federal question, necessary to a decision of a case, is made
to depend upon a discussion of the federal question in the
opinion or upon the procurement of a certificate, then the
constitutional rights of appellants in federal cases pending
in state courts would depend exclusively upon the mercy of
the state courts. The jurisdiction of this Court is not so
easily evaded.

IV

It should not be overlooked that appellant contended
in the state courts and now urges that the construction of
the ordinance, so as to deny the right to challenge the con-
stitutionality of the ordinance as applied in this criminal
case, and the holding limiting the defense to mandamus or
certiorari, itself constitutes a burden upon freedom of as-
sembly, speech and worship contrary to the Constitution.
The state question of procedure in this case itself consti-
tutes a burden on rights guaranteed by the First Amend-
ment to the Federal Constitution. This question, therefore,
is properly before this Court.

This Court should notice that the courts below did not
expressly hold that the defense of unconstitutionality as
applied could not be considered. By silence and the refusal
to consider the point, properly raised in the motion, the
courts below implicitly held that the unconstitutionality of

the ordinance as construed and applied could not be considered.

V

It is erroneously stated by the appellee that the determination of the validity of the ordinance by the Supreme Court of New Hampshire in its first opinion did not go out of bounds of the decision in *Cox* v. *New Hampshire*, 312 U. S. 569, affirming *State* v. *Cox*, 91 N. H. 137. The opinion on certified question transferred by reserved case to the Supreme Court of New Hampshire by the Superior Court of New Hampshire does go beyond the *Cox* decision. The Supreme Court illegally grafted onto the ordinance the theory that the Council had zoned the parks, so as to permit religious meetings in some parks and deny them in others, including Goodwin Park where appellant spoke. The ordinance as construed, applied and enforced was held not to be an unconstitutional violation of appellant's rights for the reason of zoning. This theory of zoning was proved to be false, a figment of the imagination of the Supreme Court of New Hampshire, and a pretext not backed up by the facts. It was not supported by the stipulated facts in the reserved case. The denial of the permit by the City Council was for only one reason. That was the policy of the City of Portsmouth not to grant permits for religious meetings in the parks of the city. The courts of New Hampshire have approved the construction, enforcement, and application of the ordinance by the City Council over the objection of appellant, properly raised, that his rights guaranteed by the First and Fourteenth Amendments have been violated.

WHEREFORE, for the reasons above stated and for

substantial grounds shown in the jurisdictional state-
, jurisdiction in this case ought to be noted.

Respectfully,

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